No. 87-1274

IN THE

Supreme Court of the United States

October Term, 1987

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC;
UNITED STEELWORKERS OF AMERICA, on behalf
of its LOCAL UNION 14530,

Petitioners,

vs.

CHEROKEE ELECTRIC COOPERATIVE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Of Counsel:

BERNARD KLEIMAN
One East Wacker Drive
Chicago, Illinois 60601

MICHAEL GOTTESMAN
BREDHOFF & KAISER
Suite 1300
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

CARL B. FRANKEL
Associate General Counsel
(Counsel of Record)
RUDOLPH L. MILASICH, JR.
Assistant General Counsel
United Steelworkers of America,
AFL-CIO, CLC
Five Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 562-2541

Counsel for Petitioners

Batavia Times Publishing Co.
Harold L. Berkoben
Pittsburgh, Pa. (412) 881-7463

Question Presented

Whether the fundamental labor law principle that arbitrators, not the courts, decide procedural issues arising in substantively arbitrable grievances is subject to an exception under which courts may invade the procedural domain whenever they find that procedural non-compliance is "clearly" established by the factual record?

TABLE OF CONTENTS.

Page

TABLE OF CITATIONS.

CASES:

IN THE

Supreme Court of the United States

October Term, 1987

No._____

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC;
UNITED STEELWORKERS OF AMERICA on behalf of its LOCAL UNION 14530,
Petitioners,

vs.

CHEROKEE ELECTRIC COOPERATIVE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners United Steelworkers of America AFL-CIO-CLC and United Steelworkers of America on behalf of its Local Union 14530 (hereinafter referred to as "USWA") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on September 4, 1987.

Opinions Below

The judgment issued by the court of appeals affirming the district court's order for the reasons stated in the district court's opinion is officially reported as a decision without published opinion. *United Steelworkers v. Cherokee*, 829 F.2d 1131 (11th Cir. 1987).[1] It is reproduced in the Appendix to this petition at App. 1a.[2] The order of the court of appeals denying rehearing and denying the suggestion for rehearing *in banc* are reproduced at App. 2a-3a. The opinion and order entered by the district court are not officially reported and are reproduced at App. 4a-14a.

Jurisdiction

The court of appeals issued its judgment on September 4, 1987, and a timely filed petition for rehearing was denied by that court on November 2, 1987. The courts below had jurisdiction of this case pursuant to 29 U.S.C. §185. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

---

[1] The court of appeal's judgment is reported in Lexis Labor Library, Courts file.

[2] The Appendix to this petition is separately paginated and is referred to herein as "App."

Statutory Provisions

The following provisions of the Labor-Management Relations Act of 1947, 29 U.S.C. 141, *et seq.*, are pertinent:

Section 203(d), 29 U.S.C. 173(d):

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . ."

Section 301(a), 29 U.S.C. 185(a):

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement of the Case

For a number of years, the USWA has been the exclusive bargaining representative of the employees employed by Cherokee Electric Cooperative ("Company") in Centre, Alabama. The USWA and the Company have been parties to a series of collective bargaining agreements, the latest of which was effective June 4, 1985 ("1985 Agreement").

As would be expected in a mature collective bargaining relationship, these parties have agreed to a broad grievance and arbitration procedure with a dependent no-strike pledge. Thus, Section 1 of Article 11 of the 1985 Agreement states:

> "There shall be no suspension of work on account of any grievance, and an earnest effort on the part of both the Cooperative and the Union shall be made to settle all grievances within the steps provided below."

Section 2 defines a grievance very broadly, as follows:

> "For the purpose of this Agreement, the term 'grievance' means any dispute between the Cooperative and the Union, or between an employee and the Cooperative concerning the interpretation or application of this Agreement."

The Procedure contains timeliness requirements, and it specifies in Step 1 that "[a]ny grievance not reported within five (5) working days of first knowledge of the occurrence causing the grievance shall be deemed wiaved (sic) and non-existent." Finally, the parties have agreed that "[t]he decision of the Arbitrator . . . shall be final and binding on both parties."

A grievable dispute arose between these parties concerning the contractual rights of employee Steve Garner to the Labor Leadman rate of pay for August 26,

1985. A timely grievance was filed, Grievance No. 52, and it was heard in arbitration on February 26, 1986. By Opinion and Award, dated April 11, 1986, the arbitrator sustained the grievance and specified that the Company was to pay grievant Steve Garner the Leaderman rate for that day.

While Garner's first leadman rate grievance was pending, a number of similar instances arose in which the Company refused to pay employee Garner the leadman rate. No grievance was filed as each similar instance arose. Instead, after the arbitrator's favorable award was issued, a new Grievance No. 62 was filed on May 12, 1986, seeking payment to Garner of the leadman rate for 43 separate instances which occurred from August 26, 1985 through April 21, 1986. Five of these instances occurred after the issuance of the arbitrator's April 11, 1986 Award—April 15, 16, 17, 18, and 21. Grievance No. 62 read, as follows:

> "Nature of Grievance
>
> I Steve Garner Grieve's (sic) to be made whole according to past practice and oral agreement, in accordance with the Arbitrator decision concerning past practice.
>
> Settlement requested in Grievance. All day's (sic) attached to report will be paid Lead Labor rate of pay. To be made whole."

The Company's written response on May 21, 1986, addressed only the merits of Grievance No. 62. The Company claimed that it had met its obligation to Garner under the Arbitrator's Award, and it granted the grievance with respect to the five post-Award instances, as follows:

> "According to our interpretation of the Arbitrator's decision, we have met our obligation to the aggrieved with the exception of five (5) days

since the decision, namely April 15, 16, 17, 18, and 21. We agree to correct this error."

The Company made no claim that Grievance No. 62 was untimely.

The Company did raise a timeliness objection for the first time on July 10, 1986 when it provided the USWA with a copy of a July 8, 1986 letter from its attorney which read as follows:

> "I have reviewed the copies of Grievance Numbers 61 and 62 filed by Steve Garner, including the Cooperative's responses to such grievances. I have also reviewed Arbitrator Ferguson's Opinion and Award of April 11, 1986 which dealt in part with Grievance Number 52 also filed by Steve Garner.
>
> Grievance Number 52, which was dated August 28, 1985 specified only the claim that Garner should have been paid the Labor Leadman rate of pay for August 26, 1985. No contention was made at the February 26, 1986 arbitration hearing by either Garner or the Union that any dates other than August 26, 1985 were involved. At the top of page 10 of his Opinion, the Arbitrator sustained Grievance Number 51 and specified that the grievant was, '. . . to be paid Leaderman rate for the day in question.'
>
> It is my understanding that Garner filed no other grievances over this issue until filing Numbers 61, on April 3, 1986, and 62, on May 12, 1986. Neither of these recent grievances were filed within the time limits specified in Article 11, Section 2, Step One, of the Contract. Thus, any grievance which Garner might have filed concerning dates after August 26, 1985, are properly deemed waived and non-existent. It is my conclusion that both Grievances Number 61 and 62 are untimely and have properly been rejected by the Cooperative for this reason. . . ."

The USWA appealed Grievance No. 62 to arbitration, but the Company refused to arbitrate. The USWA then commenced the instant litigation, under Section 301(a), seeking to compel the Company to arbitrate Grievance No. 62.

Cross motions for summary judgment were filed in the district court. The substantive arbitrability of the leadman rate issue was not disputed. The only question was the apparent untimeliness of Grievance No. 62. The USWA relied upon the grievance papers and argued that, as a matter of law, the issue of the timeliness of Grievance No. 62 was a procedural matter for the arbitrator to decide (App. 11a). The Company relied upon affidavits stating that Grievance No. 62 had been filed more than five days after the incidents cited therein, and it argued that arbitration should be denied because the 1985 Agreement renders untimely grievances waived, non-existent and deemed settled in favor of the non-defaulting party (App. 8a).

The district court resolved the untimeliness issue in the Company's favor. The district court found, as a matter of undisputed fact, that the Company had never extended or waived the contractual five day limit and that employee Garner had not reported the grievance to his immediate supervisor within five work days after he first had knowledge of the Company's claimed breach (App. 8a). The district court distinguished the Eleventh Circuit cases, which held that timeliness was an issue for the arbitrator, on the grounds that there was a waiver issue in those cases and that, here, there was "no *question* of timeliness since the Steelworkers have never even asserted that the grievance was timely." (App. 13a) (emphasis in the original). The district court

noted that it would be a waste of time to permit arbitration "where there is no dispute over the facts bearing on the timeliness issue . . . ." (App. 14a). The district court granted the Company's motion, holding as a matter of law "that Cherokee Electric did not agree to submit to arbitration grievances which on their face are untimely and to which the timeliness issue is not disputed, and that the Collective Bargaining Agreement expressly excludes such issues from arbitration." (App. 14a).

The Eleventh Circuit affirmed, *per curiam* and without a written opinion, for the reasons stated in the district court's opinion (App. 1a).

REASONS FOR GRANTING THE WRIT

This case presents the question of whether there can be any exception to the fundamental principle of national labor policy that questions of procedural compliance are for the arbitrator to decide when they arise in the context of a labor dispute which is substantively arbitrable. The decisions of the Eleventh Circuit and the district court, that procedural questions are for the court to decide whenever the court finds that the facts clearly establish non-compliance, conflicts flatly with the decisions of this Court and those of other Circuits.

I. The decisions of the courts below are directly contrary to this Court's decision that an arbitrator is to decide all procedural issues concerning a substantively arbitrable dispute.

This Court has fashioned from the Congressional intent embodied in Sections 203(d) and 301 of the LMRA a labor law framework of peaceful resolution of contractual labor disputes through voluntary arbitration which has contributed greatly to an unprecedented era of labor peace. The success is attributable to the fact that voluntary grievance and arbitration procedures are "at the very heart of the system of industrial self-government . . ." which operates with no governmental compulsion and an extremely limited judicial enforcement function. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). The judicial activism engaged in by the courts below, sanctioning judicial intervention in the arbitration process whenever the facts of procedural non-compliance are clear in court's view, threatens the self-governing nature of the voluntary arbitration system.[3]

[3] Employers and unions are free to decide in collective bargaining whether or not to agree to an arbitration provision. Nevertheless, the vast majority of the collective bargaining agreements contain arbitration provisions. Hundreds of thousands of grievances are filed every year, tens of thousands of cases reach the arbitration step, and thousands of opinions are issued by arbitrators, almost all without judicial intervention. The American Arbitration Association estimates that each year approximately 17,400 grievances are filed with it, that half of those are settled, and that approximately 8,500 cases are decided by arbitrators. Robert E. Meade, *AAA Labor-Management Arbitration Case Analysis* (May, 1986). Similarly, FMCS data shows that 30,050 grievances were submitted to it for panels, that there were 13,219 arbitrators appointed, and that approximately 6,000 cases were closed by arbitrators in 1981. Federal Mediation And Conciliation Service, 34th Annual Report, Tables 14 & 15 (1981). If employers, or unions for that matter, ever become convinced that resort to the courts in grievance and arbitration matters will yield benefits, this system of self-government and the judicial system will suffer greatly.

This Court has emphasized repeatedly the very narrow role assigned to the judiciary. Prior to the issuance of an award, the judiciary is "strictly confined to the question whether the reluctant party did agree to arbitrate the grievance . . . ." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Thus, a court must determine whether "the contract contains an arbitration clause . . ." and whether the subject matter of the grievance falls within its scope. *AT & T Tech., Inc. v. Communications Workers*, _____ U.S. _____, 106 S.Ct. 1415, 1419 (1986). However, a court must apply a "presumption of arbitrability", resolving all doubts in favor of coverage, and it must not consider the merit, or lack of merit, of the underlying dispute. 106 S.Ct. at 1419. Where, as here, "the parties have agreed to submit all questions of contract interpretation to the arbitrator", a court has the "very limited" function of "ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-568 (1960). Once the arbitrator has ruled, a court must enforce the award, absent questions of arbitral misconduct or public policy, so long as the arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority . . . ." *United Paperworkers v. Misco, Inc.*, _____ U.S. _____, 108 S.Ct. 364, 371 (1987).

Applying the same principles of judicial restraint, this Court refused to expand the exception to the anti-strike injunction prohibition beyond permitting injunctions where the strike is over an arbitrable dispute. *Buffalo Forge v. United Steelworkers*, 428 U.S. 397, 406-407 (1976). In *Buffalo Forge*, this Court refused to expand the exception to include injunctions against sympathy strikes where the only arbitrable issue is the contractual

lawfulness of the sympathy strike itself. 428 U.S. at 408-409. This Court rejected the rule applied here by the courts below, that the courts may intervene "at least where the violation, in the court's view, is clear . . . ." 428 U.S. at 412. This Court did so because "this would still involve hearings, findings, and judicial interpretations of collective-bargaining contracts." 428 U.S. at 412. This Court observed that "it is difficult to believe that the arbitrator would not be heavily influenced or wholly preempted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted." 428 U.S. at 412.

In stark contrast with these principles of judicial restraint are the decisions of the courts below that judicial intervention in the arbitral process is appropriate whenever the court views the facts establishing procedural non-compliance as clear (App. 13a-14a). The courts below went far beyond their limited role of determining whether the subject matter of Grievance No. 62 is substantively arbitrable because no one contested the substantive arbitrability of the leadman upgrade issue. They have engaged in the type of judicial fact finding and contract interpretation which this Court held in *Buffalo Forge* would wholly preempt the jurisdiction of the arbitrator.

Indeed, the decisions of the courts below are directly contrary to this Court's decision in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). This Court held in *Wiley* that "[o]nce it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." 376 U.S. at 557. The proposition, that "strictly 'procedural' " issues could be decided by

the courts, was rejected by this Court because such instances would be rare, the task of separating related issues would be difficult, and there would be "frequent duplication of effort" by the court and the arbitrator. 376 U.S. at 558. Moreover, this Court refused to allow even strictly procedural questions to be decided by the judiciary because that would interject delay into the arbitral process which would be contrary to our national labor policy:

> "In addition, the opportunities for deliberate delay and the possibility of well-intentioned but no less serious delay created by separation of the 'procedural' and 'substantive' elements of a dispute are clear. While the courts have the task of determining 'substantive arbitrability,' there will be cases in which arbitrability of the subject matter is unquestioned but a dispute arises over the procedures to be followed. In all of such cases, acceptance of Wiley's position would produce the delay attendant upon judicial proceedings preliminary to arbitration. As this case, commenced in January 1962 and not yet committed to arbitration, well illustrates, such delay may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs) and contrary to the aims of national labor policy." 376 U.S. at 558.

This Court recently re-affirmed the holding in *Wiley* "that when the subject matter of a dispute is arbitrable, 'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator." *United Paperworkers v. Misco, Inc.*, _____ U.S. _____, 108 S.Ct. 364, 372 (1987).

It is important to note that the very issue of timeliness present in the case below was also present in *Wiley*. Not only did the employer in *Wiley* argue that the union had

bypassed the entire grievance procedure, it also argued that the union had failed to meet the contractual timeliness requirements that a grievance must be filed within 4 weeks or be deemed abandoned:

> "In addition to the failure to follow the procedures of Steps 1 and 2, Wiley objects to the Union's asserted failure to comply with §16.6, which provides: 'Notice of any grievance must be filed with the Employer and with the Union Shop Steward within four (4) weeks after its occurrence or latest existence. The failure by either party to file the grievance within this time limitation shall be construed and be deemed to be an abandonment of the grievance.'" 376 U.S. 556 n.11.

Thus, both the fact of untimeliness and the contractual consequences of that untimeliness (abandonment or non-existence of the grievance) were just as clear in *Wiley* as they are in this case.

To be sure, as the district court found, the USWA did not submit pleadings, affidavits, depositions, answers to interrogatories or admissions disputing the untimeliness of the grievance (App. 13a-14a). To do so would have invited the very judicial fact finding, contract interpretation and proceedings and the attendant delay of the arbitral process that this Court held in *Wiley* and *Buffalo Forge* were improper.[4]

[4] The justification for the untimeliness was apparent upon the face of the grievance papers themselves. The grievance alleged not only a violation of the 1985 Agreement, but a violation of the "Arbitrator decision." That arbitration decision had just issued on April 11, 1986 and upheld grievant Garner's right to the leadman pay when he was upgraded. Thus, the crux of this grievance dispute is whether the pendency of the prior grievance and arbitration over the leadman pay for upgrade dispute made it unnecessary for employee Garner to file individual grievances over each subsequent and identical upgrade violation. The Company's initial written response understood that to

(Footnote continued on following page.)

The decisions of the courts below show that the judiciary remains hostile to arbitration. If, rather than filing this suit to compel arbitration the USWA had gone out on strike when the Company refused to arbitrate Grievance No. 62, the courts below would have not hesitated to enjoin the strike. They would have held that the USWA was striking over an arbitrable matter and, as a condition of the injunction, would have ordered the Company and the USWA to resolve both the leadman upgrade dispute and the timeliness dispute in arbitration. The result must be the same when the USWA abides by the law and files a suit to compel arbitration. Otherwise, the willingness of unions and employees to continue to accept arbitration as a substitute for strikes will be seriously diminished.

(Footnote continued from preceding page.)

be the issue because it raised no timeliness question whatsoever and, indeed, granted the grievance insofar as it involved upgrades for days subsequent to the April 11, 1986 Arbitrator's decision—"namely April 15, 16, 17, 18 and 21." The Company did so even though the latest of those dates, April 21, occurred more than five working days prior to the filing of Grievance No. 62 on May 12, 1986, and was not grievable under the literal wording of the contract. Thus, Grievance No. 62 presents an issue of waiver and an issue of the interpretation of the contractual timeliness requirements in light of a pending arbitration, both of which are issues of contract interpretation that are for an arbitrator to decide. The Eleventh Circuit enforced an arbitrator's award finding that a company had waived the timeliness issue when, as here, the grievance was accepted on its merits in the first step. *Drummond Coal v. Mine Workers*, 748 F.2d 1495, 1496, 1498 (1984).

II. The holdings of the courts below are in direct conflict with opinions of other courts of appeals.

The holdings of the courts below, that procedural questions are for the court to decide whenever the court views the facts as clearly establishing procedural non-compliance, conflict directly with the decisions of the Seventh Circuit and other courts of appeals.

The Seventh Circuit in *Niro v. Fearn International, Inc.*, 827 F.2d 173 (1987) upheld an order directing arbitration of a discharge dispute even though the facts were clear that "[t]he Union never filed a grievance challenging [the] . . . discharge . . . ." 827 F.2d at 174. The employer in that case argued that "if procedural shortcomings are severe enough, they become substantive failings and render the underlying dispute nonarbitrable." 827 F.2d at 175. Relying upon this Court's holding in *Wiley* and the decisions of the courts of appeals which have followed that holding, the Seventh Circuit held that, because the underlying discharge dispute was substantively arbitrable, the effect of the procedural errors was for the arbitrator to decide, as follows:

> "This court and others have heeded *John Wiley* and are slow to enter the thicket of deciding whether, under a particular collective bargaining agreement reached by private parties, an alleged violation of the agreement should be characterized as essentially 'procedural' or 'substantive.' Federal courts face sufficiently daunting tasks trying to classify statutory requirements into procedural and substantive categories for purposes of the diversity jurisdiction. The prospect of conducting similar analyses of private labor agreements counsels caution. We agree, therefore, that once it is determined that the underlying dispute concerns a subject matter covered by arbitration provisions, the court's only role is to order arbitration. The arbitrator should determine the effect of any 'procedural' shortcomings of either party. . . ." 827 F.2d at 176 (citations omitted).

Similarly, the D.C. Circuit and the First, Second, Third, Fourth, Fifth, Sixth, Eighth and Ninth Circuits have held, applying *Wiley*, that the issue of the untimeliness of a grievance is for an arbitrator to decide where the subject matter of that grievance is substantively arbitrable. *Washington Hosp. Center v. Service Employees*, 746 F.2d 1503, 1506 n.1, 1507-1508 (D.C. Cir. 1984) (Arbitration ordered despite court's conclusion that there was no dispute of material fact that union had missed the contractual time limit for appealing the grievance to arbitration and the contract specified that any grievance not timely appealed "shall be deemed waived."); *Trailways of New England v. Motor Coach Employees*, 343 F.2d 815, 818 (1st Cir. 1965), cert. denied, 382 U.S. 879 (1965); *Rochester Telephone Corp. v. Communications Workers*, 340 F.2d 237, 239 (2d Cir. 1965) (*per curiam*); *Nursing Home & Hosp. Un., Local 434 v. Sky Vue Terrace*, 759 F.2d 1094, 1097 (3d Cir. 1985); *Tobacco Workers, Local 317 v. Lorillard Corp.*, 448 F.2d 949, 953-954 (4th Cir. 1971); *Local 406, Operating Engineers v. Austin Co.*, 784 F.2d 1262, 1263, 1264-1265 (5th Cir. 1986) (Arbitration ordered of an allegedly untimely grievance even though contract specified that grievances not filed within 30 days "shall be considered finally settled and waived."); *Local 12934, District 50 Mine Workers v. Dow Corning Corp.*, 459 F.2d 221, 223-224 (6th Cir. 1972); *Auto. Petr. & Allied Industries Empl. Un., Local 618 v. Town & Country Ford*, 709 F.2d 509, 510, 513 (8th Cir. 1983) (Arbitration ordered of an allegedly untimely grievance even though the contract specified that the failure to present a grievance within

the time limits "shall constitute a bar to further action."); *Hospital & Inst. Workers v. Marshal Hale Mem. Hosp.*, 647 F.2d 38, 41 (9th Cir. 1981); *See, Int. Un., Auto Workers v. Folding Carrier Corp.*, 422 F.2d 47, 49 (10th Cir. 1970).

On the other hand, the holdings of the courts below are supported by the Third Circuit's decision in *Philadelphia Printing Pressmen's Un. No. 16 v. International Paper Co.*, 648 F.2d 900 (1981). In that case, the union conceded that it had given only oral notice of the dispute to the employer while the contract required that the grievance be in writing. 648 F.2d at 904. The Third Circuit refused to order arbitration, holding that "[w]hat the Union seeks is to skip the entire grievance machinery established by the collective bargaining agreement and to proceed directly to arbitration of a controversy that has not ripened into a grievance." 648 F.2d at 904 (footnote omitted). However, the Third Circuit's holding in *International Paper* has been rejected expressly by the D.C. Circuit and the Eighth Circuit. *Washington Hosp. Center v. Service Employees*, 746 F.2d 1503, 1511-1512 (D.C. Cir. 1984); *Auto, Petr. & Allied Industries Emp. Un., Local 618 v. Town & Country Ford, Inc.*, 709 F.2d 509, 512 (8th Cir. 1983).

This Court should grant certiorari to resolve the split among the circuits over this important labor law issue.

Conclusion

For the reasons stated herein, this Court should issue a Writ of Certiorari to review the judgment of the court below.

Respectfully submitted,

Of Counsel:

BERNARD KLEIMAN
One East Wacker Drive
Chicago, Illinois 60601

MICHAEL GOTTESMAN
BREDHOFF & KAISER
Suite 1300
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

CARL B. FRANKEL
Associate General Counsel

RUDOLPH L. MILASICH, JR.
Assistant General Counsel
United Steelworkers of America,
AFL-CIO, CLC
Five Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 562-2541

Counsel for Petitioners

APPENDIX
Judgment of the United States Court of Appeals for the Eleventh Circuit

IN THE
UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 87-7213

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC;
UNITED STEELWORKERS OF AMERICA, on behalf of its LOCAL UNION 14530,
Plaintiffs-Appellants,

versus

CHEROKEE ELECTRIC COOPERATIVE,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

(September 4, 1987)

Before FAY, Circuit Judge, HENDERSON*, Senior Circuit Judge, and BLACK**, District Judge.

PER CURIAM:

The judgment of the trial court is AFFIRMED for the reasons stated in the Memorandum Opinion entered by the district court on February 19, 1987.

* See Rule 34-2(b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

** Honorable Susan H. Black, U. S. District Judge for the Middle District of Florida, sitting by designation.

Order of the United States Court of Appeals for the Eleventh Circuit

IN THE
UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 87-7213

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC;
UNITED STEELWORKERS OF AMERICA, on behalf of its LOCAL UNION 14530,
Plaintiffs-Appellants,

versus

CHEROKEE ELECTRIC COOPERATIVE,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC
(Opinion *September 4, 1987*, 11 Cir., 198____, ____ F.2d ____).

(November 2, 1987)

Before FAY, Circuit Judge, HENDERSON*, Senior Circuit Judge, and BLACK**, District Judge.

---

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Susan H. Black, U.S. District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc Are DENIED.

. . . .

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

Order of the United States District Court for the Northern District of Alabama, Middle Division

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

Civil Action No.
86-AR-2163-M

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *ET AL.*,

Plaintiffs,

vs.

CHEROKEE ELECTRIC COOPERATIVE,

Defendant.

ORDER

In conformity with the accompanying Memorandum Opinion, the court EXPRESSLY DETERMINES that there exists no genuine issue of any material fact and that defendant Cherokee Electric Cooperative is entitled to judgment as a matter of law. Accordingly, it is

ORDERED, ADJUDGED and DECREED by the court that the motion for summary judgment of defendant Cherokee Electric Cooperative be and the same is hereby GRANTED, and the action is DISMISSED with prejudice.

Costs are taxed against plaintiffs.

DONE this 19th day of February, 1987.

/s/ _____
WILLIAM M. ACKER, JR.
United States District Judge

Memorandum Opinion of the United States District Court for the Northern District of Alabama, Middle Division

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

Civil Action No.
86-AR-2163-M

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *ET AL.*,

Plaintiffs

vs.

CHEROKEE ELECTRIC COOPERATIVE,

Defendant

MEMORANDUM OPINION

Plaintiffs United Steelworkers of America, AFL-CIO-CLC, and United Steelworkers of America on behalf of its Local Union 14530 bring this action seeking to compel defendant Cherokee Electric Cooperative to submit to arbitration a grievance filed by the local Union on May 12, 1986, pursuant to the terms of the Collective Bargaining Agreement entered into by the Company and the Unions. Cherokee Electric denies that the grievance is subject to arbitration, claiming that the grievance is "waived and non-existent" because it was untimely filed under the terms of the labor contract. Both parties have

filed motions for summary judgment pursuant to F.R.Civ.P. 56. While neither side, of course, admits that the other is entitled to summary judgment, they agree that there are no material facts in dispute. Although this court is not bound by any such agreement, this court itself finds no material facts in dispute and concludes that this action is ripe for judgment as a matter of law, one way or the other. The only question is: Which way?

Undisputed Pertinent Facts

The Unions and Cherokee Electric are parties to a Collective Bargaining Agreement entered into and effective June 4, 1985. It governs the terms and conditions of employment of the bargaining unit employees at Cherokee Electric. On May 12, 1986, the local Union submitted to Cherokee Grievance No. 62, wherein employee Steve Garner claims that he is entitled to a higher rate of pay as a result of alleged violations of the agreement by Cherokee on approximately 43 different dates, ranging from August 26, 1985, through April 21, 1986.

The agreement provides in pertinent part:

> SECTION 2. For the purpose of this Agreement, the term "grievance" *means any dispute between the Cooperative and the Union, or between an employee and the Cooperative concerning the interpretation or application of this Agreement. . . .*
>
> STEP 1. *The employee must report a grievance to his or her immediate supervisor within five (5) work days after employee's first knowledge of the occurrence causing the grievance.* If the immediate supervisor is not available, the grievance shall be reported for the record to the Department Head, or his or her designated representative. *Any grievance not reported within*

five (5) working days of first knowledge of the occurrence causing the grievance shall be deemed wiaved [sic] and non-existent. . . .

SECTION 3. *Failure of the Cooperative or the Union to take the required action(s) or meet within the time limits, or any mutually agreed extension(s) thereof prescribed in Section 2 above, shall be deemed a settlement of the grievance in favor of the party in whose the favor the default runs.* Failure to request arbitration in writing within the above thirty-one (31) day period, or extension thereof, shall be deemed a waiver of the right to arbitrate and the grievance shall be recognized as resolved.

Article II, §§2, 3 at 16, 20. (emphasis supplied).

Garner did not report the grievance to his immediate supervisor, Bobby McCord, within five work days after he first obtained knowledge of the occurrence creating his alleged claim. Neither did Garner report the grievance to M. S. Harris, the Manager of Operations, who was McCord's immediate supervisor. The grievance was not presented to Harris until May 12, 1986, when it was finally filed by the Union. At no time did any representative of Cherokee Electric extend or waive the time limit specified in the Collective Bargaining Agreement for the filing of a grievance. The Union processed the untimely grievance pursuant to the provisions of the Collective Bargaining Agreement. Cherokee Electric denied the grievance at every step of the procedure and refused to arbitrate the grievance. Cherokee Electric contends now, and has unequivocably contended at all times since the grievance was filed, that Grievance No. 62 was not timely filed under Article II, Section 2, Step 1, of the Collective Bargaining Agreement and thus is not subject to arbitration because it is properly "deemed waived and non-existent" or "settled."

Conclusions of Law

The issue before this court is whether the parties to the Collective Bargaining Agreement intended to arbitrate all grievances or whether, because of an express exclusion or other "forceful evidence," Cherokee Electric intended to exclude from arbitration those grievances that are untimely filed.

The United States Supreme Court enunciated the principles to be applied by this court when considering the question of the arbitrability of a grievance in *AT&T Technologies, Inc. v. Communications Workers of America*, _____ U.S. _____, 106 S.Ct. 1415 (1986):

> The first principle gleaned from the *Trilogy* is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf, supra*, 363 U.S. at 582, 80 S.Ct. at 1353; *American Mfg. Co., supra*, 363 U.S. at 570-571, 80 S.Ct., at 1364-1365 (BRENNEN, J., concurring).
>
> * * *
>
> The second rule, which follows inexorably from the first, is that the question of arbitrability—whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. [citations omitted].
>
> * * *
>
> " 'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by

the parties.' ... The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *Id.* at 546-547, 84 S.Ct., at 912-913. (citations omitted).

The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator.

* * *

Finally, where it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." [citations omitted]. Such a presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder . . . ." In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Warrior & Gulf, supra,* 363 U.S., at 584-585, 80 S.Ct., at 1353-1354.

106 S.Ct. at 1418-19.

The above quotation makes it clear that a strong federal policy favors arbitration when agreed to by the parties to a Collective Bargaining Agreement. Any doubts regarding whether a matter is arbitrable are to be resolved in favor of arbitrability. The only question here is whether this particular grievance must be submitted to arbitration, and the court does not bother itself with whether or not the grievance has merit. *Id; see also John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 84 S.Ct. 909 (1964); *Alabama Power Company v. Local Union No. 391, International Brotherhood of Electrical Workers,* 612 F.2d 960 (5th Cir. 1980).

The Unions argue here that the garden variety arbitration clause clearly includes the subject matter of this grievance. The Steelworkers emphasize that the contract provides that all grievances are to be settled according to the steps provided therein and defines "grievance" as "any dispute between the Cooperative and the Union, or between an employee and the Cooperative concerning the interpretation or application of this Agreement." CBA, Article II, §§1, 2. Article II, §2, Step 3(c) provides that if the previous steps do not satisfactorily settle the grievance, then "either party shall have thirty-one (31) calendar days to appeal the case to arbitration by giving written notice of intent to do so to the other party, and by requesting in writing from the Federal Mediation and Conciliation Service a panel of five (5) arbitrators." The Steelworkers argue that, under the terms and conditions of the contract, Cherokee Electric should not be entitled unilaterally to determine the timeliness of a grievance, that the question of timeliness is procedural and therefore should be determined by the arbitrator. *Shopman's Local 539 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO v. Mosher Steel Company,* 796 F.2d

1361 (11th Cir. 1986); *Drummond Coal Company v. United Mine Workers of America*, 748 F.2d 1495 (11th Cir. 1984); *Local No. 406, International Union of Operating Engineers, AFL-CIO v. Austin Company*, 784 F.2d 1262 (5th Cir. 1986).

Cherokee Electric, on the other hand, argues that the clear language of the contract does not contemplate arbitration of an *untimely* grievance since, under the terms of the contract, such grievance is considered to be "deemed waived and non-existent" and "deemed a settlement of the grievance in favor of the party in whose ... favor the default runs." Cherokee Electric insists that if the Steelworkers' argument that an untimely and thus "waived" grievance must nevertheless be submitted to arbitration for a "procedural" determination of timeliness is adopted by this court, then Cherokee Electric would be subject to arbitration of all grievances regardless of whether or not the Steelworkers comply with the time limitations in the contract. Cherokee Electric correctly points out that the Steelworkers have never contended that the grievance was timely, relying instead on the argument that "timeliness" is not a question before the court. The court notes that the Steelworkers have offered no evidence whatsoever indicating that there is even a "question" as to timeliness, and the affidavits offered by the Company which flatly and consistently state that the grievance was untimely have not been gainsaid by the Steelworkers.

The Steelworkers have not disputed the provisions of the Collective Bargaining Agreement delineating the time requirements that both the Company and the Unions are to comply with in the dispute resolution process. The contract clearly states that if the time

limitations are not complied with, the grievance is deemed waived, non-existent, and a settlement of the grievance in favor of the party to whom the default runs. The Unions have not offered evidence of and do not seem to contend that the grievance was timely filed. Instead, they simply argue that timeliness is a question for the arbitrator. *Mosher Steel, supra*, and *Drummond, supra*, are cited as binding Eleventh Circuit authority supporting the Union's proposition. However, this court finds that both *Mosher Steel* and *Drummond* are distinguishable on their facts, because in both cases the companies' actions arguably waived their timeliness objections such that the *question* of timeliness was for the arbitrator. Here, there is no *question* of timeliness since the Steelworkers have never even asserted that the grievance was timely. They have failed to carry their burden as required by *Celotex Corp. v. Catrett*, _____ U.S. _____, 106 S.Ct. 2548 (1986), and have, in essence, admitted that the grievance was untimely filed.

The simple question to be decided is whether under the terms and conditions of this contract Cherokee Electric is obligated to arbitrate an admittedly untimely filed grievance and to allow the Union to contest the timeliness of the grievance before the arbitrator. Applying the reasoning used by the Eleventh Circuit in *Mosher Steel* to the facts of this case, this court concludes that in order to be entitled to present the issue of the timeliness of a grievance to an arbitrator, the issue must have been legitimately raised by the Union so that there is a bona fide procedural timeliness question to be determined by the arbitrator. In this case there is no legitimate question of timeliness since the Steelworkers have, in effect, conceded that the grievance was not timely filed by failing to dispute it in their pleadings and failing to support any such contention by affidavits,

depositions, answers to interrogatories, or admissions. This court finds that Cherokee Electric did not agree to submit to arbitration grievances which on their face are untimely and to which the timeliness issue is not disputed, and that the Collective Bargaining Agreement expressly excludes such issues from arbitration.

To permit an arbitrator to arbitrate the issue of timeliness where there is no dispute over the facts bearing on the timeliness issue would be to waste the time of the arbitrator and of the parties, and if an arbitrator should erroneously find that this particular grievance was timely filed, the finding would be so manifestly arbitrary and capricious as to require a reviewing court to set it aside. Such a procedural quagmire can hardly comport with the rationale which favors arbitrability.

For the reasons stated, the Steelworkers' motion for summary judgment is due to be denied, and Cherokee Electric's motion for summary judgment is due to be granted.

A separate order will be entered.

DONE this 19th day of February, 1987.

/s/ _____

WILLIAM M. ACKER, JR.
United States District Judge